

**REMARKS**

Claim 1 is pending within this application. No claims have been added, amended, or deleted.

The Office has continued its position with regard to the rejection of the only pending claim under 35 U.S.C. § 102(b) as being anticipated by Hirsbrunner, and has now stated that “regardless of the intended purpose” of such a reference, the disclosed subject matter reads on the language of this sole pending claim. Such a claim reads as follows:

“A synthetic hydrophobic sand formulation exhibiting a penetration period of at least 9 seconds for a drop of 2 molar ethanol under a minimal ethanol drop test wherein at least a portion of said sand formulation is treated with humic acid.”

Hirsbrunner mentions the presence of humic acid only in passing as a possible, not required, component of his soil conditioning/treating formulations within a laundry list of other possible additives. An anticipatory teaching will clearly teach the same limitations as a claimed invention; this is not the case here. As such, the Office’s position that anticipation lies in this situation is clearly wrong, at least from the perspective that humic acid is a required component within patentees’ compositions. If anything, this reference provides a basis of obviousness for the suggestion that humic acid may be present within the formulations of Hirsbrunner.

This incorrect anticipatory basis of rejection is amplified by the fact that Hirsbrunner fails to teach any specific or implied limitations of hydrophobicity to the extent now claimed. Contrary to the Office’s belief that Hirsbrunner teaches an hydrophobic soil treatment, the fact that patentee clearly states that crops and foliage grow within the soil

treated with patentee's formulations should provide a sufficient teaching that such is not the case. As such, the holding of anticipation is, again, clearly wrong and counterintuitive to the actual and implied teachings within this cited reference. As above, at best the Office may find a basis of obviousness over the pending claims (although Applicants do not agree with such an assessment) in terms of hydrophobicity to the extent now claimed. Thus, it is imperative that one look at the claims and prior art from the purview of the ordinarily skilled artisan. In such a situation such a fictional construct must look to the actual function of Hirsbrunner's soil treatment formulations to determine if such a teaching would have led that person to develop that which is now claimed. It should be evident, considering the lack of teaching of any hydrophobic results (if not clear contradiction thereof due to the requirement that cops and foliage receive sufficient water supply while treated with such formulations) for Hirsbrunner's treatments, that the ordinarily skilled artisan would not have viewed this reference to provide the same synthetic hydrophobic sand as currently claimed. As such, the intended purpose of Hirsbrunner, to provide thickening of treated soil to prevent wind and water erosion simultaneously, is of great importance in the proper determination of the applicability of the Hirsbrunner reference over the pending claim. It is evident that hydrophobicity is neither a need nor a want of Hirsbrunner; if such were the case, the plant life to be grown within his treated soils would not survive. Thus, the Office's sustenance of any rejection over the claimed invention, anticipatory or otherwise, is improper. Reconsideration and withdrawal of such an improper rejection are therefore earnestly solicited.

**CONCLUSION**

In view of all of the previous remarks, it is respectfully requested that the pending claim is in condition for allowance and thus that this application be passed on to issue.

Respectfully requested,

September 3, 2003



William S. Parks  
Attorney for Applicants  
Registration Number 37,528  
Telephone: (864) 503-1537

**CERTIFICATE OF MAILING**

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to Mail Stop Non-Fee Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on September 3, 2003, along with a postcard receipt.



William S. Parks  
Attorney for Applicants